Questions Presented

1. Should this Court issue a Writ of Certiorari to the Wyoming District Court?
2. Does qualified immunity for executive officials protect the public's interest in effective functioning of government?
3. Can a state appellate court define its own procedures for state causes of action?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2195

GEORGE KINSEL,

Petitioner,

v.

JACK WOLFE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF HOT SPRINGS COUNTY, WYOMING AND THE SUPREME COURT, STATE OF WYOMING

RESPONSE TO PETITIONS FOR WRIT OF CERTIORARI

Opinions Below

The letter opinion of the District Court of Hot Springs County, Wyoming, of August 19, 1981, and the Order dated October 2, 1981, and entered on the docket on October 5, 1981, thereupon; and the letter denial of reconsideration dated October 28, 1981, and the Order dated and entered on the docket on November 10, 1981, thereupon appear, respectively at 1a, 3a, 5a, and 6a of the Appendix to the Petition for a Writ of Certiorari and are incorporated herein by reference. None is reported.

The Order Dismissing Appeal of December 30, 1981, by the Supreme Court, State of Wyoming, and its Order Denying Reinstatement of January 26, 1982, appear respectively at 8a and 10a of the Appendix to the Petition and are incorporated herein by reference. Neither is reported.

Jurisdiction

The Order of the District Court of Hot Springs County, Wyoming was entered on October 5, 1981; a Motion for Reconsideration filed on October 7, 1981, was denied by Order entered November 10, 1981.

Notice of Appeal to the Supreme Court, State of Wyoming, was filed on November 10, 1981. The Appeal was dismissed by Order entered on December 30, 1981. A Petition for Reinstatement was filed on January 21, 1982, and denied by Order of January 26, 1982.

By Order of March 22, 1982, this Court extended the time for filing a petition for a Writ of Certiorari to and including May 29, 1982.

The jurisdiction of this Court to review the decision of the District Court of Hot Springs County, Wyoming is founded upon 28 U.S.C. § 1257(3).[1] Under state law, the judgment of the Wyoming District Court is not subject to discretionary interlocutory review. (Pet. App. at 10a.) Nor is the Wyoming District Court Order of October 2, 1981, a final order subject to appeal under Rule 1.05 of the Wyoming Rules of Appellate Procedure. (Pet. App. at 8a-9a.) Therefore, the Wyoming District Court's judgment is that of the highest court of the state in which decision

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[1] 28 U.S.C. § 1257(3) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

could be had. *See, e.g., Faretta v. California*, 422 U.S. 806, 812 (1975); *Minneapolis, St. P & S. Ste. M. Ry. v. Rock*, 279 U.S. 410, 411-12 (1929); *Virginian Ry. v. Mullens*, 271 U.S. 220 (1925).

Statement of the Case

Petitioner, George Kinsel, at the times pertinent to this suit, was employed as a supervisory petroleum engineer in charge of the Thermopolis, Wyoming office of the United States Geological Survey (USGS), Department of Interior. (Complaint at 1.) Respondent, Jack Wolfe, is the sole manager of C.L. Bayne Trucking, Worland, Wyoming. (Complaint at 1.) C.L. Bayne Trucking is engaged in a general oil field trucking and hauling business. (Complaint at 1.) At the end of March, 1980, there was a minor oil spill at an Altus Exploration well location. Altus contracted with Wolfe's company to skim this oil off the pit. While a truck driver employed by Wolfe was skimming the pit, one of Kinsel's field technicians appeared and asked where the oil was going. (Kinsel Dep. Tr. at 14.) Wolfe's driver said he did not know because he had been told to call his employer on the radio when he finished skimming to find out the destination of the oil.

Jack Wolfe arrived on the scene and spoke with the field technician. The technician then called Kinsel to tell him that oil was being transported to some unknown location by Wolfe's company. (Kinsel Dep. Tr. at 14.) In response to this phone call, Kinsel promptly telephoned the Denver office of Altus Exploration, the lessee of the well, to notify it of his decision to rescind a limited oral approval he previously had given to haul oil off the lease. (Kinsel Dep. Tr. at 14.) During this call, he spoke with Elmer Herbaly, an Altus employee, informing him of the field technician's report ad requesting him to shut down the well. Wolfe claims that it was during this discussion that Kinsel slandered him by telling Herbaly that Wolfe had stolen the oil. (Complaint at 2.)

Wolfe filed a slander action against Kinsel in the District Court of Hot Springs County, Wyoming. Kinsel responsed that,

as a government official, he was cloaked with absolute immunity from suit because his actions, in conversing with Herbaly, were within the scope of his official duties under the doctrine of *Barr v. Matteo*, 360 U.S. 564 (1959). Kinsel moved for dismissal or for summary judgment. Wolfe opposed Kinsel's motion by submitting Herbaly's affidavit, which supports the claim that Wolfe had indeed been slandered by Kinsel.

On August 19, 1981, District Judge Harold Joffe issued a letter opinion stating that he would deny Kinsel's motion. (Pet. App. at 1a-2a.) The Judge found that absolute immunity would apply only in the case of a government employee making a report to another gvernment employee or his supervisor. The Judge felt that the conversation with Herbaly constituted a discussion with a third person and was, therefore, outside of the ambit of Kinsel's duties.

On October 2, 1981, Judge Joffe issued his Order denying Kinsel's motion. (Pet. App. at 3a-4a.) The Judge stated that Kinsel was entitled only to a qualified privilege, citing Justice Brennan's dissenting opinion in *Barr*.

Kinsel's motion for reconsideration was denied on November 10, 1981. (Pet. App. at 6a.) He then appealed to the Wyoming Supreme Court. This appeal was dismissed on De mber 30, 1981, on the ground that Judge Joffe's Order was not final. (Pet. App. at 8a-9a.) Kinsel filed a Petition for Reinstatement, asserting that when a claim for absolute immunity is denied, the order is final for purposes of appeal. This petition was denied by Order of January 26, 1982. (Pet. App. at 10a.) The Wyoming Supreme Court denied the petition stating that it was not subject to any prevailing federal rule for interlocutory appeal.

Argument

I. THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI TO THE WYOMING DISTRICT COURT

This case offers the Court an opportunity to provide essential clarification on the otherwise confusing law of governmental

immunity. For that reason, the Court should issue the Writ to the District Court of Hot Springs County, Wyoming and affirm its judgment with instructions and guidelines for similar cases.

As the law now stands, the Wyoming District Court opinion is the clearest authoritative statement on the precise issue of the case — whether lower level government officials may be held liable for tortious conduct. (Pet. App. at 1a-2a.) Although this Court has recently developed a sophisticated body of law dealing with governmental immunity for alleged constitutional injury, *e.g.*, *Harlow v. Fitzgerald*, 102 S. Ct. 2727 (1982); *Butz v. Economou*, 438 U.S. 478 (1978); *Wood v. Strickland*, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974), the last case deciding the extent of immunity for tortious conduct is *Barr v. Matteo*, 360 U.S. 564 (1959). Although *Barr* has not been explicitly overruled, the opinion is confusing and has been significantly eroded by subsequent cases passing upon the scope of immunity for constitutional injury.

Barr was a plurality opinion, authored by Justice Harlan and joined by Justices Frankfurter, Clark and Whittaker. Justice Black concurred in the result, and Chief Justice Warren, Justices Douglas, Brennan and Stewart dissented. Justice Harlan's plurality opinion does not stand for absolute immunity, as petitioner argues. Instead, the plurality maintains that government officials are immune from tort liability as long as they are acting "within the outer perimeter of [their] line of duty. . . ." 360 U.S. at 575. Thus, even under *Barr*, it is a factual question whether the official was acting within the scope of his duty. Summary judgment in the official's favor would rarely be appropriate, since he has *no* immunity, either qualified or absolute, if acting outside the scope of his duty.

If *Barr* is assumed to stand for absolute immunity, it is uncertain whether the plurality's views are any longer the law. For example, this Court in *Wood v. Strickland*, 420 U.S. 308 (1975), held that government officials were immune from liability unless they knew or reasonably should have known that their actions would result in a constitutional deprivation *or other injury*.

420 U.S. at 322 (emphasis added). Because "other injury" obviously includes torts, it is arguable that the plurality view of *Barr* has been implicitly replaced by a qualified immunity standard as advocated by Justice Brennan's dissent in *Barr*. In any event, there is no clear holding on the issue and this Court should accordingly provide some definitive guidance.

II. THE WYOMING DISTRICT COURT APPLIED THE APPROPRIATE IMMUNITY STANDARD

Barr v. Matteo, 360 U.S. 564 (1959) and *Howard v. Lyons*, 360 U.S. 593 (1959) should be limited to the specific facts of those cases. In *Barr*, the official involved was acting director of a federal agency. This Court found that a publicly expressed statement, by the head of an agency announcing personnel actions he planned to take, was an appropriate exercise of discretion. According to the Court, an officer responsible for making policy must possess such discretion if the agency is to function effectively. 360 U.S. at 574-75. Likewise, in *Howard v. Lyons*, this Court observed that it was part of the federal officer's official duties to send copies of the report at issue to members of the Massachusetts Congressional delegation. 360 U.S. at 597.

In the present case, the Wyoming District Court found that Kinsel's remark was beyond the outer perimeter of his official duties and was not an appropriate exercise of discretion. (Pet. App 2a.) That factual determination is significant because it is "the relation of the act complained of to matters committed by law to [the] control or supervision" of the official which determines the extent of his immunity from civil defamation suits. *Barr*, 360 U.S. at 573-574. This statement suggests that "in varying scope, a *qualified* immunity is available to officers of the executive branch of government [depending upon] the scope of discretion and responsibilities of the office...." *Scheuer v. Rhodes*, 416 U.S. at 247 (emphasis added).

Moreover, this case should be analyzed in light of the current trend in immunity law conferring upon most executive officials a qualified immunity. *Butz v. Economou*, 438 U.S. 478 (1978). The

test for qualified immunity for state executive officials was enunciated in *Wood v. Strickland*, 420 U.S. 308 (1975). Such officials were immune from liability unless they knew or reasonably should have known that their actions would result in a constitutional deprivation or other injury. 420 U.S. at 322.

It is apparent from *Wood* and *Scheuer*, that this Court envisioned the test for immunity as applying to injuries other than constitutional violations. To argue for two tests — one for constitutional injury and one for torts — is inconsistent. The "two test" system gives an executive official absolute protection from liability for his tortious conduct unless a plaintiff artfully pleads his injury as a constitutional wrong, thereby gaining the advantage of the qualified immunity standard. There is no principled reason for such an inconsistency. An individual has no less a right to redress because the infringement could not be pleaded in constitutional terms.

In *Butz v. Economou*, 438 U.S. at 507-08, this Court found that federal executive officials were entitled to only a qualified immunity, recognizing that a blanket holding of absolute immunity would be anomalous in light of the qualified immunity standard applied to state executive officials. One of the major concerns in *Butz* was insuring that executive officials would not be subject to vexing litigation for actions taken in the performance of their official duties. However, the way to minimize the burdens of litigation does not generally lie through the abolition of a right of redress for an admitted wrong. *Barr*, 360 U.S. at 589 (Brennan, J., dissenting). Qualified immunity adequately protects the public's interest in the effective functioning of government and is the best attainable accomodation of competing values. *Harlow v. Fitzgerald*, 102 S. Ct. at 2738; *Butz v. Economou*, 438 U.S. at 507-08; *Scheuer v. Rhodes*, 416 U.S. at 245-48.

The public interest is not only in limiting defamation suits against government officials. The public also has a profound interest in preserving the opportunity to criticize the administration of our government. Indeed, as Chief Justice Warren noted in his dissenting opinion in *Barr*:

> [I]t will take a brave person to criticize government officials knowing that in reply they may libel him with immunity in the name of defending the agency and their position.

360 U.S. at 585.

Barr v. Matteo and *Howard v. Lyons* underscore this Court's concern about inquiring into an executive officer's motives for taking certain official action. In order to quickly terminate insubstantial lawsuits, this Court revised the *Wood v. Strickland* qualified immunity test to avoid judicial inquiry into the subjective motivation of an official claiming qualified immunity. *Harlow v. Fitzgerald*, 102 S. Ct. at 2736-38. Thus, government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow*, 102 S.Ct. at 2738.

This reasoning should be extended to suits for defamation against executive officials. Kinsel's utterances would, therefore, be protected by qualified immunity as long as they did not infringe upon clearly established common law rights. In fact, in many cases it is far easier to comprehend tortious conduct than it is to determine what constitutes a constitutional violation. No inquiry would be made at the summary judgment stage into Kinsel's subjective motivation for making defamatory statements about Wolfe. It would only be necessary to inquire into whether there was a clearly established right which was violated by Kinsel's actions.

. This approach would avoid applying a shifting standard of immunity for executive officials depending upon the violation

alleged in the complaint. Executive conduct could then be guided by the long line of cases setting out the standards for qualified immunity.

III. WYOMING MAY ADOPT ITS OWN PROCEDURAL RULES TO GOVERN STATE CAUSES OF ACTION

The rule at common law was that there could be no appeal except from a final judgment, which was defined as one that disposed of all the issues as to all the parties. *Collins v. Miller*, 252 U.S. 364 (1920). Wyoming has defined a final judgment as one which determines the merits of the controversy and leaves nothing for future consideration. *Public Service Commission v. Lower Valley Power and Light*, 608 P.2d 660 (Wyo. 1980). It is a firmly established rule of Wyoming procedure to avoid entertaining piecemeal appeals. *Knudson v. Hilzer*, 551 P.2d 680 (Wyo. 1976).

Similarly, Justice Frankfurter observed that permitting appeals from interlocutory orders would result in delay: "To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause." *Cobbledick v. United States*, 309 U.S. 323, 325 (1940). This statement parallels a federal policy against piecemeal appeals. Congress has limited appeals to "final decisions", 28 U.S.C. § 1291, and interlocutory orders falling within four narrow categories. 28 U.S.C. § 1292 (1976).

Petitioner, on the other hand, claims that the Wyoming courts must follow the federal rules relating to interlocutory appeals because he is asserting a federal defense to a state claim. In response to such an argument, this Court has recognized that:

> When federal law is the source of the plaintiff's claim, there is a federal interest in defining the defense to that claim, including the defense of immunity. (Citations omitted.) That interest, of course, is not present in a case, such as this, arising under state law.

Ferri v. Ackerman, 444 U.S. 193, 198 n.13 (1979).

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RESPONSE TO PETITION FOR WRITS OF CERTIORARI

Of Counsel:

JAMES H. SPERRY
721 Big Horn
Worland, Wyoming 82401

WILLIAM H. MELLOR III
MAXWELL A. MILLER
Counsel of Record
CASEY SHPALL
Mountain States Legal Foundation
1200 Lincoln Street
Denver, Colorado 80203
(303) 861-0244

Counsel For Respondent

October 4, 1982

Respondent's claim, in this case, is based on state law. Hence, state courts need not ignore their own procedures simply because a federal defense is asserted. Requiring state courts to apply federal procedural rules where a state cause of action is asserted would contravene states' Tenth Amendment right to establish their own judicial systems.

Conclusion

The Petition for a Writ of Certiorari to the District Court of Hot Springs County, Wyoming should be granted. The Petition for a Writ of Certiorari to the Supreme Court, State of Wyoming should be denied.

Respectfully submitted,

William H. Mellor III
Maxwell A. Miller
Counsel of Record

Casey Shpall
MOUNTAIN STATES LEGAL FOUNDATION
1200 Lincoln Street, Suite 600
Denver, Colorado 80203

Counsel For Respondent

October 4, 1982

Certificate of Service

I hereby certify that on this 1st day of October, 1982, I placed in the United States Mail, postage prepaid the foregoing Response to Petition for Writs of Certiorari to the following parties:

Walter H. Fleischer
Daniel S. Goodman
Cole and Groner, P.C.
1730 K Street, N.W.
Washington, D.C. 20006

Cole and Groner, P.C.
1730 K Street, N.W.
Washington, D.C. 20006

Casey Shpall